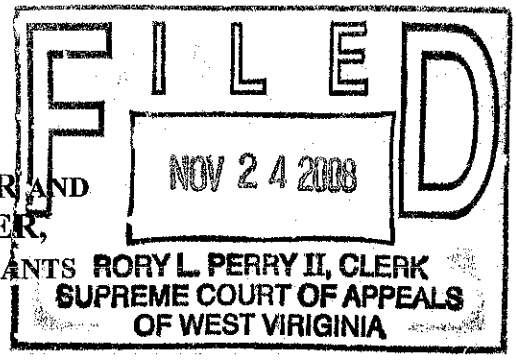
IN THE SUPREME COURT OF APEALS OF WEST VIRGINIA

No. 34269



ANN MORGAN ZIMMERER AND GERALD LEE ZIMMERER,
PLAINTIFFS BELOW, APPELLANTS

VS.

MARK E. ROMANO, ROBIN J. ROMANO AND WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS,
DEFENDANTS BELOW, APPELLEES

HONORABLE GARY L. JOHNSON, JUDGE
CIRCUIT COURT OF NICHOLAS COUNTY
CIVIL ACTION NO. 04-P-50

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

This is the reply brief of the Appellants, Ann Morgan Zimmerer and Gerald Lee Zimmerer ["Zimmerers"], in support of their appeal from the decision of the Circuit Court of Nicholas County to award summary judgment in favor of the Appellees, Mark E. Romano and Robin J. Romano ["Romanos"].

The Zimmerers have been wrongfully deprived of their property interests and the Romanos have been awarded property which they plainly never acquired. First, the circuit court plainly erred by holding that the Romanos acquired property plainly reserved from both the Greenwood Timber and Romano deeds. Second, the circuit court plainly erred by holding that the West Virginia Division of Highways ["Division"] could convey to the Romanos property never owned by the Division. Third, the circuit court erred by allowing the Division to violate the clear provisions of the relevant statutes and regulations regarding the rights of property owners when Division rights of way are being abandoned. Finally, if the Zimmerers are to be deprived of their property interests under these circumstances, they are entitled to vindication of their right by a jury trial.

Accordingly, the Zimmerers respectfully submit that this Court should either enter judgment as a matter of law in their favor or, in the alternative, remand the case for a jury trial.

II. ARGUMENT

A. THE CIRCUIT COURT ERRED AS A MATTER OF LAW AND FACT IN ITS CONCLUSION THAT THE ROMANO APPELLEES OWNED IN FEE SIMPLE THE 20.29 ACRES CONVEYED BY THE HILL HEIRS TO THE APPELLANTS.

This case involves a property dispute over 20.29 acres, currently owned by the Zimmerers. The 20.29 acres was originally part of an 82.65 acre ancestral farm in Nicholas

County, West Virginia, owned for generations by the Hill family and adjoining another ancestral farm owned by the Zimmerers' family for generations.

In July 1971, as a result of an eminent domain action and for the purpose of improving and widening portions of Route 19, the Division of Highways acquired three tracts totaling 20.29 acres of the 82.65 acre farm. By statute, however, the Division could only obtain a right of way for public road purposes,[1] not fee simple in the land, and, accordingly, the description in the Final Order conveyed only rights of way to the Division.[2]

Over twenty years later, in 1995, the three remaining Hill heirs and their spouses sold 62.36 acres of the 82.65 acre farm to Greenwood Timber, Inc., and reserved to themselves all of their rights, title, and interest in the remaining three tracts of 20.29 acres subject to the Division's rights of way.[3] After removing the timber, Greenwood Timber subsequently sold 56.813 acres of the 62.36 acres it bought from the Hill heirs in 1995 to the Appellee, Mark Romano, in 1998.[4]

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[1]W. Va. Code 17-2A-17 (1967) ("[T]he commissioner may acquire, either temporarily or permanently, in the name of the state road commission all real or personal property, public or private, or any interests or rights therein, including any easement, riparian right, or right of access, deemed to be necessary for present or presently foreseeable future state road purposes by . . . right of eminent domain, or other lawful means. Such real property may be acquired in fee simple or in any lesser estate or interest therein, except in the case of a public road the right-of-way only shall be acquired. . . .")(emphasis added).

[2]Final Order dated August 18, 1971 (recorded in Nicholas Co. Deed Book 238, p. 691), attached as Ex. 7 to Plaintiffs Motion for Reconsideration.

[3]Deed dated April 6, 1995 (recorded in Nicholas Co. Deed Book 0362, pp. 809-811), attached as Ex. 6 to Plaintiffs Motion for Reconsideration.

[4]Plaintiffs Motion for Reconsideration at Ex. 54 (Contract of Sale dated Oct. 22, 1998); Ex. 59 (Deed dated Dec. 9, 1998, and recorded in Nicholas Co. Deed Book 388, p. 748).

Between 1997 to 2002, the Hill heirs then conveyed their remaining 20.29 acres to the Appellant, Ann Morgan Zimmerer,[5] who owns adjoining farmland. Ms. Zimmerer subsequently conveyed an undivided 1/4 interest in the 20.29 acres to her son and Appellant, Gerald Lee Zimmerer.[6] Thus, the Zimmerers have a 100% fee simple ownership interest in the 20.29 acres, including the 1.18 acres in dispute in this action, subject only to the Division's rights of way.

First, despite the clear language of the Hill and Greenwood Timber deeds, title reports, and sales contracts, the Romano Appellees contend in their response brief, without quoting the actual language of these documents, that the entire 82.65 acres subject to the Division's 20.29 acre rights of way was conveyed by Greenwood Timber to the Romanos.

It is beyond dispute, however, that in 1995, the Hills reserved this 20.29 acre tract, in which they held a fee simple interest subject to the Division's rights of way, from their conveyance to Greenwood Timber. As this Court observed in *Belcher v. Powers:*

> West Virginia Code § 36-1-11 (1923) (Repl. Vol. 1997) explains that the estate which is conveyed or devised by deed may well be limited by an intention appearing in the conveyance:
>
> > When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had power to dispose

[5]Plaintiffs Motion for Reconsideration at Ex. 14 (Quitclaim Deed dated July 28, 1997 and recorded in Nicholas Co. Deed Book 379, pp. 391-92, conveying James W. Hill, Jr. and wife's ownership interest in 20.29 acres to Ann Morgan Zimmerer); Ex. 15 (Quitclaim Deed dated Nov. 29, 2002 and recorded in Nicholas Co. Deed Book 243, pp. 244-45, conveying William Guy Hill and wife's ownership interest in 20.29 acres to Ann Morgan Zimmerer); Ex. 48 (Quitclaim Deed dated Sept. 11, 1998 and recorded in Nicholas Co. Deed Book 393, p. 759, conveying ownership interest of Thomas Watkins Perry, Sr., surviving spouse of Ruth Hill Perry, in 20.29 acres to Ann Morgan Zimmerer).

[6]Quit Claim Deed dated Oct. 15, 2006 (recorded in Nicholas Co. Deed Book 435, pp. 627-628), attached as Ex. 16 to Plaintiffs Motion for Reconsideration.

> of, in such real property, unless a contrary intention shall appear in the conveyance or will.

Id. Our well-established case law likewise recognizes that when confronted with construing a deed, "the intention of the grantor controls" which requires that "the whole instrument, not merely and separately disjointed parts, is to be considered." Syl. Pt. 6, in part, *Uhl v. Ohio River R. Co.*, 51 W. Va. 106, 41 S.E. 340 (1902). We have also said that the polar star which should guide courts in the construction of deeds is the intention of the parties making the instrument. *Totten v. Pocahontas Coal & Coke Co.*, 67 W. Va. 639, 642, 68 S.E. 373, 374 (1910). The importance of giving deference to the intent of the parties when construing a deed was perhaps best summarized in syllabus point one of *Maddy v. Maddy*, 87 W. Va. 581, 105 S.E. 803 (1921), when this Court said:

> In construing a deed, will or other written instrument, it is the duty of the court to construe it as a whole, taking and considering all the parts together, and giving effect to the intention of the parties wherever that is reasonably clear and free from doubt, unless to do so will violate some principal of law inconsistent therewith.

Accordingly, we have found that it is only in cases where the intent of the parties to a deed is unclear and no other rule of construction can resolve the ambiguity that doubt is resolved in favor of the grantee. Syl. Pt. 6, *White Flame Coal Co. v. Burgess*, 86 W. Va. 16, 102 S.E. 690 (1920).[7]

In this case, the title report described the land being sold by the Hill heirs to Greenwood Timber as "62.36 surface acres located on the waters of Muddelty Creek, Hamilton District, Nicholas County, West Virginia."[8] After the metes and bounds description, the deed further provided: "However, there is reserved from the above description that previous outconveyance to

[7]212 W. Va. 418, 424, 573 S.E.2d 12, 18 (2002).

[8]Title Search dated April 7, 1995, attached as Ex. 56 to Plaintiffs Motion for Reconsideration.

the West Virginia Department of Highways of 20.29 acres, leaving a residue of 62.36 acres, more or less."[9]

Moreover, affidavits from parties to the deed, including the lawyer who prepared the title report and deed, all agree that the 20.29 acres subject to the Division's rights of way was reserved from the Hill conveyance to Greenwood Timber. By affidavit dated February 27, 2006,[10] the lawyer who prepared the title report and the deed, Larry E. Losch, stated:

> It was Mr. Hill's intention to reserve the residue of the 20.29 acres referred to in the deed to he and the other joint tenants, not merely to create an exception for the right of way encumbering the 20.29 acres from the 82.65 acres described in the deed. The language appearing in the deed stating, "However, there is reserved from the above description that previous outconveyance to the West Virginia Department of Highways of 20.29 acres, leaving a residue of 62.36, more or less.", was intended to effect this reservation.

By affidavit dated March 31, 2004,[11] James William Hill, Jr. stated:

> My siblings and I advertized and sold 62.36 acres more or less to GREENWOOD TIMBER, INC., a West Virginia corporation, on the 6th day of April, 1995, reserving all of the three tracts previously taken by the West Virginia Department of Highways. We never intended to, nor did we, sell our interests in the three tracts of land taken by the West Virginia Highways Department to Greenwood Timber; we reserved that interest ourselves as outlines in the deed to Greenwood Timber, Inc. . . .

And by affidavit dated April 26, 2004,[12] Thomas Watkins Perry, Sr. stated:

> On the 6th day of April, 1995, having advertized the 62.36 acres of land, we sold it to GREENWOOD TIMBER, INC., a West Virginia corporation. Those signing the deed were JAMES WILLIAM HILL, JR. and ANN B. HILL, his wife; WILLIAM

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[9]Ex. 6 to Plaintiffs Motion for Reconsideration.

[10]Ex. 58 to Plaintiffs Motion for Reconsideration.

[11]Ex. 29 to Plaintiffs Motion for Reconsideration.

[12]Ex. 34 to Plaintiffs Motion for Reconsideration.

> GUY HILL and MARY JO HILL, his wife; and RUTH HILL PERRY and myself, WATKINS PERRY, her husband. EUGENE L. HILL and PATTIE HILL, his wife did not sign the deed as Eugene had no interest in it; he having conveyed all his rights, title and interest in the subject Tract of land to JAMES W. HILL, JR. by deed signed the 28th day of October, 1971. and filed in Deed Book 243, Page 244 on July 12, 1972 in the deed records of Nicholas County, West Virginia.
>
> . . . . The deed shows the outer bounds of the land previously owned, and the tracts reserved. We, RUTH HILL PERRY and I, specifically, did not intend to convey to GREENWOOD TIMBER, INC. the property taken by the West Virginia Department of Highways. We never intended to, nor did we, sell our interests in the three tracts of land taken by the West Virginia Highway Department to GREENWOOD TIMBER, INC.

Not only does the Hill deed to Greenwood Timber clearly and unambiguously reserve from the conveyance the 20.29 acres subject to the Division's rights of way, the contract of sale between Greenwood Timber and the Romanos provides:

> The SELLER agrees to sell and convey, and the PURCHASER agrees to purchase, the premises, with the buildings and improvements thereon, described as: BEING ALL THAT PROPERTY ON THE SW SIDE OF THE ACCESS ROAD OFF RT. 19, 61.496 ACRES MORE OR LESS SUR MUDDLETY SR 19 HAMILTON DISTRICT, NICHOLAS COUNTY, WEST VIRGINIA, MINUS A 4.683 ACRE OUT CONVEYANCE TO TRUMBALL CORP.[13]

The Greenwood Timber deed to Mr. Romano indicates that the conveyance is "the same property that was conveyed unto the Grantor herein by deed of James W. Hill, Jr., *et ux*, *et als*, dated April 16, 1995 and recorded in the Nicholas County Clerk's office in Deed Book 362 at page 809."[14] The deed further provides that "this conveyance is subject to all previous outconveyances of record, including the following . . . 1. That 20.29 acres previously conveyed unto the West

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[13]Ex. 54 to Plaintiffs Motion for Reconsideration (emphasis added).

[14]Ex. 59 to Plaintiffs Motion for Reconsideration.

Virginia Department of Highways. . . ."[15] Accordingly, Mr. Romano was placed on specific legal notice of the previous Hill conveyance to Greenwood Timber, which conveyed only 62.36 surface acres to Greenwood Timber and reserved the remaining 20.29 acres, subject to the Division's rights of way, to the Hill heirs.

It is fundamental that "a grantee acquires nothing more than the grantor owns and can convey, particularly where the title of grantor appears in deeds of record."[16] Thus, the circuit court's conclusion that Mr. Romano acquired that which was not owned by Greenwood Timber was simply wrong. The circuit court's conclusion that the Hill heirs reserved only the Division's rights of way over the 20.29 acres in their conveyance to Greenwood Timber was also error. By holding that the Hill heirs reserved from Greenwood Timber only the Division's rights of ways even though the Division's property interest was already fully safeguarded by the 1971 Final Order, the circuit court erred by attaching no significance to the reservation language used to safeguard the Hill heirs' fee simple ownership in the 20.29 acres subject to the Division's rights of way and thereby construing the conveyance as if such language had been omitted.[17]

Second, the Romano Appellees contend in their response brief that the circuit court was compelled under *Weekley v. Weekly*[18] to construe any ambiguity in the Hill deed to Greenwood

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[15] *Id.* (emphasis added).

[16] *Wellman v. Tomblin*, 140 W. Va. 342, 344, 84 S.E.2d 617, 619 (1954).

[17] It has long been held that the word "reserve" is an appropriate word when given obvious and technical meaning to indicate that the grantor intends to withhold a right, title, or interest in the subject matter which, but for the reservation, would pass to the grantee. *Gordon Metal Co. v. Kingan & Co.*, 111 S.E. 99, 132 Va. 229 (1922). On the other hand, the word "reserve" is an inappropriate and unnecessary word if intended merely to preserve the existence of a right of a third party under a separate contract with the grantor since such right is already fully safeguarded. *Id.*

[18] 126 W. Va. 90, 27 S.E.2d 591 (1943).

Timber against the Hill heirs as grantors in favor of the Romanos. As already discussed, this Court observed in *Belcher v. Powers*:

> Our well-established case law likewise recognizes that when confronted with construing a deed, "the intention of the grantor controls" which requires that "the whole instrument, not merely and separately disjointed parts, is to be considered.' . . . We have also said that the polar star which should guide courts in the construction of deeds is the intention of the parties making the instrument. . . . Accordingly, we have found that it is only in cases where the intent of the parties to a deed is unclear and no other rule of construction can resolve the ambiguity that doubt is resolved in favor of the grantee.[19]

In this case, Greenwood Timber, not the Romanos, was the grantee in the Hill deed transaction and has never asserted that it was sold the entire 82.65 acres. Of all the participants involved in the various transactions in this case, only the Romanos contend that they acquired more than what was actually owned and sold to them by their grantor, Greenwood Timber.

Finally, even though the Division's answer acknowledged the Zimmerers' fee simple ownership of the land in dispute in this action, the Division now contends in its response brief that it determined before selling the vacated right of way to the Romanos that they owned the property subject to the right of way based upon the language of the Hill/Greenwood Timber and Greenwood Timber/Romano deeds. Of course, as already discussed, the clear and unambiguous language of these deeds as well as the applicable title reports and sales contracts indicate otherwise. Moreover, the Division's current position is not supported by the record.

Despite being acquired in 1971, the Division altered their route and did not use all of the land previously taken in the 1970s for the purpose of improving and widening Route 19. Eventually, Ms. Zimmerer corresponded with the Division in July 1997, August 1998, and, again, in October 1998, about purchasing its surplus interest in the farmland previously owned

[19]212 W. Va. 418, 424, 573 S.E.2d 12, 18 (2002) (citations omitted).

by the Hill heirs and subsequently conveyed to the Zimmerers. Unbeknownst to Ms. Zimmerer until 2003, however, Mr. Romano also wrote the Division in December 1998 about purchasing any State-owned surplus right of way abutting his property.[20]

After it was appraised for $2800 in July 2001,[21] the Division sold Mr. Romano 1.18 acres of its 12.99 acre "controlled access right of way[22]" (or Tract No. 1 of the three tracts totaling 20.29 acres condemned from the Hill property in 1971) for $2600 in January 2002.[23] Ann Zimmerer was never informed by the Division that her application to acquire the same property interest was denied.[24] Ann Zimmerer was never afforded the right of first refusal over all other abutting landowners to purchase the Division's vacated right of way as an owner in fee simple of the land.[25] Alternatively, Ann Zimmerer was never afforded the right to notice and the option to purchase the Division's vacated right of way for fair market value as an abutting landowner.[26]

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[20]December 23, 2003 Letter from WVDOT to Ann Zimmerer enclosing documentation of Mark Romano's property management file, attached as Ex. 30 to Plaintiffs Motion for Reconsideration.

[21]Ex. 30 to Plaintiffs Motion for Reconsideration.

[22]*See* 39A C.J.S. Highways § 141 ("Limited or controlled access highways are designed for movement of through traffic, and cross traffic must be eliminated or severely curtailed and entrances and exists strictly limited, with the result that abutting landowners have no easement or right of access different from that enjoyed by the public in general.")(footnotes and citations omitted).

[23]Plaintiffs Motion for Reconsideration at Ex. 8 (Quitclaim Deed dated January 10, 2002). *See also* Ex. 9 (Correction Deed dated January 20, 2004); Ex. 7 (Final Order dated August 18, 1971).

[24]Affidavit of Ann Morgan Zimmerer dated December 29, 2005, attached as Ex. 31 to Plaintiffs Motion for Reconsideration.

[25]*Id.*

[26]*Id. See also* Ex. 9 to Plaintiffs Motion for Reconsideration (Correction Deed dated January 20, 2004)(describing conveyance from Division to Mark Romano to include "a corner common to Mark Romano, Ann Morgan Zimmerer, and the West Virginia Department of

The Division only gave the Romanos notice and a right of first refusal to purchase the Division's vacated right of way apparently based on the Romanos' misrepresentation that they were the owners in fee simple of the 1.18 acres subject to the vacated right of way. Moreover, no evidence was presented below that the Romanos were required to present a tax certificate, a deed, a title examination, or a survey showing such ownership or even a duly executed affidavit alleging such ownership as provided by the regulations governing the Division's sale of highway property to principal abutting landowners.[27]

Thereafter, Mr. Romano caused to be prepared a "quit claim" deed dated January 10, 2002, that incorrectly described the Division's right of way conveyed to Mr. Romano as over the "same real estate conveyed unto Mark E. Romano and Robin J. Romano by Greenwood Timber, Inc., a West Virginia corporation, by deed dated November 19, 1998, of record in the office of the Clerk of the County Commission of Nicholas County, West Virginia, in Deed Book 388 at Page 748." In response to August and December 2002 letters from Ann Zimmerer requesting that the Romanos stop making unauthorized changes to her property,[28] Mr. Romano then claimed

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Transportation, Division of Highways, formerly owned by William Guy Hill and Mary Jo Hill" and a "division line between Ann Morgan Zimmerer and the West Virginia Department of Transportation, Division of Highways. . . .").

[27]*See* W. Va. C.S.R. § 157-2-3.5(d) ("[T]he abutting landowner is an abutting landowner at the time of the sale. Such landowner shall be determined by the Commissioner's employees or agents or staff, or by attorneys or other professionals employed by the Commissioner to make title examinations or other proof to substantiate who the landowner is. In all cases the landowner shall submit proof of his or her ownership by way of certified copy of deed, payment of current year's taxes evidenced by tax receipt, or in the case of heirs who do not have deeds, such proof shall be by way of certified documented records of heirship or intestate ownership. In the absence of any documentation in the official records of County Clerks' offices in the various counties in the State of West Virginia, the Commissioner may accept duly executed affidavits in support of any alleged ownership by the landowner. Principal abutting landowners . . . shall be determined in the same manner as abutting landowners.").

[28]Ex. 36 and Ex. 37 to Plaintiffs Motion for Reconsideration.

that he owned the land in fee simple per his deed from the Division even though it only conveyed to him a right of way.[29] Indeed, by letter dated July 29, 2003, to Ann Zimmerer,[30] and another letter dated August 11, 2003, to the Nicholas County Assessor,[31] the District Attorney for the Division of Highways, G. Alan Williams, acknowledged that the Division had only acquired a right of way, not a fee simple interest, in the land condemned for public road purposes in 1971, that the Division could only convey what it owned, and, thus, the Division only conveyed a right of way to Mr. Romano.

By subsequent letter dated August 28, 2003,[32] Mr. Romano's attorney, Gregory A. Tucker, then claimed that Greenbrier Timber sold to Mr. Romano the entire 82.65 acre farm formerly owned by the Hill heirs even though (1) the Deed dated April 6, 1995, between the Hill heirs and Greenwood Timber only conveyed 62.36 surface acres of the 82.65 acre farm to Greenwood Timber and "reserved from the above description that previous outconveyance to the West Virginia Department of Highways of 20.29 acres, leaving a residue of 62.36 acres" to the Hill heirs;[33] (2) the Contract of Sale dated Oct. 22, 1998, between Greenwood Timber and Mr. Romano only provides that Greenwood Timber agreed to sell and convey and Mr. Romano

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[29]Ex. 38 to Plaintiffs Motion for Reconsideration.

[30]Ex. 21 to Plaintiffs Motion for Reconsideration.

[31]Ex. 61 to Plaintiffs Motion for Reconsideration.

[32]Ex. 39 to Plaintiffs Motion for Reconsideration.

[33]Ex. 6 to Plaintiffs Motion for Reconsideration. *See also* Ex. 56 (Title Search dated April 7, 1995)(describing the land being sold by the Hill heirs to Greenwood Timber as "62.36 surface acres located on the waters of Muddelty Creek, Hamilton District, Nicholas County, West Virginia."); Ex. 29 (Affidavit of James William Hill, Jr. dated March 31, 2004)(stating that Hill heirs' intention was to sell 62.36 acres to Greenwood Timber and reserve all rights, title, and interest in remaining 20.29 acres for themselves); Ex. 34 (Affidavit of Thomas Watkins Perry, Sr.)(same); Ex. 58 (Affidavit of Larry E. Losch, attorney who prepared deed, dated February 27, 2006)(same).

agreed to purchase 56.813 acres of the 62.36 acres previously conveyed by the Hill heirs to Greenwood Timber;[34] (3) the Deed dated December 9, 1998, between Greenwood Timber and Mr. Romano only conveyed 56.813 acres of the 62.36 surface acres previously conveyed by the Hill heirs to Greenwood Timber and was "subject to all previous outconveyances of record, including the following . . . 1. That 20.29 acres previously conveyed unto the West Virginia Department of Highways. . . .";[35] and (4) the Hill heirs conveyed the remaining 20.29 acres of their former 82.65 acre farm to Ms. Zimmerer.[36]

Although the Romano Appellees complain about the Appellants' use of the word "subterfuge" to describe Mr. Romano's actions regarding the subject property, the record is what it is. Mr. Romano used a quit claim deed to attempt to bootstrap the purported conveyance of a Division right of way into a conveyance of a fee simple interest. A "quit claim" deed, however, "is one which purports to convey, and is understood to convey, nothing more than the interest or estate in the property described of which the grantor is seized or possessed, if any, at the time, rather than the property itself."[37]

Of course, at the time of execution of this so-called "quit claim" deed the Division had already purportedly conveyed whatever interest it had in the subject property to Mr. Romano. It

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[34]Ex. 54 to Plaintiffs Motion for Reconsideration.

[35]Ex. 59 to Plaintiffs Motion for Reconsideration.

[36]Plaintiffs Motion for Reconsideration at Ex. 14 (Quitclaim Deed dated July 28, 1997 and recorded in Nicholas Co. Deed Book 379, pp. 391-92, conveying James W. Hill, Jr. and wife's ownership interest in 20.29 acres to Ann Morgan Zimmerer); Ex. 15 (Quitclaim Deed dated Nov. 29, 2002 and recorded in Nicholas Co. Deed Book 243, pp. 244-45, conveying William Guy Hill and wife's ownership interest in 20.29 acres to Ann Morgan Zimmerer); Ex. 48 (Quitclaim Deed dated Sept. 11, 1998 and recorded in Nicholas Co. Deed Book 393, p. 759, conveying ownership interest of Thomas Watkins Perry, Sr., surviving spouse of Ruth Hill Perry, in 20.29 acres to Ann Morgan Zimmerer).

[37]26A C.J.S. *Deeds* § 17 (2007).

was not "quit claiming" anything.[38] Rather, Mr. Romano plainly had the deed prepared to bolster the argument that he had acquired a fee simple interest in property not only reserved by the Hill heirs from the Greenwood Timber deed, but clearly not conveyed by Greenwood Timber in the Romano deed because Greenwood Timber had previously acquired only 62.36 surface acres of the 82.65 acre farm owned by the Hill heirs, conveyed only 56.813 of these acres to Mr. Romano, and also expressly stated in the Romano deed that such conveyance was subject to all prior conveyances including the previous reservation by the Hill heirs of the 20.29 acres subject only to the Division's rights of way.

To the extent that the conveyance of the Division's interest in the subject property has been interpreted to have defeated the Zimmerers' interest, they also submit that it constitutes a taking of property without due process of law and just compensation. The typical "taking" occurs when a government entity formally condemns a landowner's property and obtains the fee simple pursuant to its sovereign power of eminent domain.[39] However, a "taking" may also occur without a formal condemnation proceeding or transfer of fee simple.

W. Va. Const. Art. III, § 9 provides, "Private property shall not be taken or damaged for public use, without just compensation . . . provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders." W. Va. Const. Art. III, § 10 provides, "No person shall be deprived of . . . property, without due process of law, and the judgment of his peers." Moreover, this Court has noted, "The Fifth Amendment

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[38]Indeed, as previously noted, a Division lawyer wrote letters to both Ms. Zimmerer and the county assessor indicating that it had conveyed only a right of way to Mr. Romano.

[39]*See, e. g., Berman v. Parker*, 348 U.S. 26, 33 (1954).

to the United States Constitution proscribes the taking of private property for public use without just compensation."[40]

Here, of all the participants in the various transactions, only the Romanos contended that they acquired more than that which was owned by their grantor. Plainly, the Hill heirs did not convey the property encumbered by the Division's rights of way to Greenwood Timber. Greenwood Timber, likewise, did not convey said property to Mr. Romano. Finally, neither the original nor the "quit claim" deed from the Division to Mr. Romano conveyed what it did not own, *i.e.*, title to the 20.29 acres purchased from the Hills heirs by the Zimmerers.

B. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN ITS INTERPRETATION OF W. VA. CODE § 17-2A-19 THAT THE APPELLANTS WERE NOT "PRINCIPAL ABUTTING LANDOWNERS" ENTITLED TO THE RIGHT OF NOTICE AND FIRST REFUSAL OVER ALL OTHER ABUTTING LANDOWNERS TO PURCHASE THE DIVISION'S VACATED RIGHT OF WAY.

By statute, the Legislature has long since determined that the quantity of land necessary for a public road is only a right of way.[41] Accordingly, the Division only acquired rights of way, not fee simple, in the three tracts totaling 20.29 acres of the 82.65 acre farm formerly owned by the Hill family in the 1970s.[42] The Hill heirs subsequently conveyed their fee simple ownership

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[40]*Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs*, 214 W. Va. 95, 141, 586 S.E.2d 170, 216 (2003).

[41]W. Va. Code 17-2A-17 (1967) provides that "the commissioner may acquire, either temporarily or permanently, in the name of the state road commission all real or personal property, public or private, or any interests or rights therein, including any easement, riparian right, or right of access, deemed to be necessary for present or presently foreseeable future state road purposes by . . . right of eminent domain, or other lawful means. Such real property may be acquired in fee simple or in any lesser estate or interest therein, except in the case of a public road the right-of-way only shall be acquired. . . ." (emphasis added).

[42]Final Order dated August 18, 1971 (recorded in Nicholas Co. Deed Book 238, p. 691), attached as Ex. 7 to Plaintiffs Motion for Reconsideration.

of the 20.29 acres to Ms. Zimmerer. Moreover, the Division did not use all of its right of way interests in this land for the purpose of improving and widening Route 19 because it altered the route originally contemplated in the 1970s.

To protect private property owners against speculative real estate takings and condemnors profiting from such takings, some states provide for statutory reversion to the owner of the fee of lesser property interests condemned and subsequently abandoned by a governmental entity.[43] Other states recognize as a matter of fundamental principle that a condemned easement abandoned by a governmental entity reverts upon nonuse to the owner of the fee.[44] Other states have enacted statutes that afford former owners, their heirs, or their assigns the option to repurchase the property for the condemnation price or fair market price, depending on the language of the statute.[45]

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[43]*See, e.g.*, Ind. Code Ann. § 32-11-1-11 (Burns 1995); Iowa Code Ann. § 478.15 (West 1991 & Supp. 1995); Minn. Stat. Ann. § 117.225 (West 1987); Mont. Code Ann. § 70-30-321(3)(1995).

[44]*See, e.g., Rogers v. City of Knoxville*, 289 S.W.2d 868, 873 (Tenn. Ct. App. 1955)(condemned easement no longer used and abandoned reverts upon nonuse to owner of fee); *Pratt v. Griese*, 409 P.2d 777, 780 (Kan. 1966) (abandoned easement reverted to servient owner regardless of method by which it was obtained).

[45]*See, e.g.*, N.Y. Em. Dom. Proc. Law § 406(A) (McKinney Supp. 1996) ("If, after an acquisition in fee pursuant to the [eminent domain] provisions of this chapter, the condemnor shall abandon the project for which the property was acquired, and the property has not been materially improved, the condemnor shall not dispose of the property or any portion thereof for private use within ten years of acquisition without first offering the former fee owner of record at the time of acquisition a right of first refusal to purchase the property at the amount of the fair market value of such property at the time of such offer."); N.H. Rev. Stat. Ann. § 498-A:12(1) (Supp. 1995) ("If a condemnor has condemned a fee and thereafter abandons the purpose for which the property has been condemned, the condemnor may dispose of it by sale or otherwise; provided, however, that if the property has not been substantially improved, it may not be disposed of within 10 years or condemnation without first being offered to the condemnee, his heirs and assigns at the same price paid to the condemnee by the condemnor. The condemnee, his heirs and assigns shall be served with notice of the offer in the manner as prescribed . . . and shall have 90 days after receipt of such notice to make the written acceptance thereof."); KY Rev. Stat. Ann. § 416.670(1) (Baldwin 1994)("Development shall be started on any property

In this case, W. Va. Code § 17-2A-19 governs the "Sale, exchange, or lease of real property" by the West Virginia Division of Highways and provides, in relevant part:

> (c)(1) This subsection applies to property held by the division, including a right-of-way, that was acquired for use, or used, as a highway. The commissioner may transfer, sell or otherwise dispose of any right-of-way properties or any interest or right in the property, owned by or to be acquired by the division of highways which the commissioner in his or her sole discretion determines are not necessary or desirable for present or presently foreseeable future highway purpose by first offering the property to the principal abutting landowners without following the procedure for public auction provided in subsection (b) of this section.
>
> (2) The commissioner shall propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code governing and controlling the making of any leases or sales pursuant to the provisions of this subsection. The rules may provide for the giving of preferential treatment in making leases to the persons from whom the properties or rights or interests in the property were acquired, or their heirs or assigns and shall also provide for granting a right of first refusal to abutting landowners at fair market value in the sale of any real estate or any interest or right in the property, owned by the division of highways.
>
> (3)(A) With respect to real property acquired subsequent to the year one thousand nine hundred seventy-three for use as a highway through voluntary real estate acquisition or exercise of the right of eminent domain, which real estate the commissioner has determined should be sold as not necessary for highways purposes, the commissioner shall give preferential treatment to an abutting landowner if it appears that:
>
> > (i) A principal abutting landowner is an individual from whom the real estate was acquired or his or her surviving spouse or descendant. In order to qualify for preferential treatment, the surviving spouse or descendant need not be a beneficiary of

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which has been acquired through condemnation within a period of eight (8) years from the date of the deed to the condemnor or the date on which the condemnor took possession, whichever is earlier, for the purpose for which it was condemned. The failure of the condemnor to so begin the development shall entitle the current landowner to repurchase the property at the price the condemnor paid to the landowner for the property.").

> the individual. The terms used in this subdivision are as defined in section one, article one, chapter forty-two of this code; and
>
> (ii) The primary use of the abutting property has not substantially changed since the time of the acquisition.
>
> (B) When the provisions of paragraph (A) of this subdivision are met, the commissioner shall offer the property for sale to the principal abutting landowner at a cost equal to the amount paid by the division of highways in acquiring the real estate. If improvements on the property have been removed since the time of the acquisition, the cost shall be reduced by an amount attributable to the value of the improvements removed. The cost may be adjusted to reflect interest at a rate equal to the increase in the consumer price index for all urban consumers as reported by the United States department of labor since the time of disbursement of the funds.

(emphasis supplied). The corresponding regulations define "Excess Real Estate" as:

> any real property or any interest or right therein, which is held by the Division of Highways and which is not necessary or desirable for present or presently foreseeable future state road purposes, or any directly or indirectly related purposes connected with the construction, maintenance or operation of state roads.

W. Va. C.S.R. § 157-2-3.3.

In *McCoy v. Vankirk*,[46] the Commissioner of the Division of Highways announced that highways property that was no longer needed would be sold at public auction for the highest and best price. The owner of land that abutted the property brought a declaratory judgment action against the Commissioner, seeking a determination that the Commissioner was statutorily required to offer the abutting landowner the right of first refusal to purchase the property for fair market value. The Court concluded that there were three classes of potential purchasers of highway property: "the general public, individuals who do not own property adjoining highway

[46]201 W. Va. 718, 726, 500 S.E.2d 534, 542 (1997).

property . . . and who are accorded no special rights under the statute" and two "types of abutting landowners . . . both accorded preference under the statute."[47] "[A]n 'abutting landowner' is an individual who owns real property that borders on or touches real property being offered for sale by the Commissioner of the Division of Highways."[48] "A 'principal abutting landowner' is an individual who owns real property that borders on or touches real property being offered for sale by the Commissioner, and who is also an individual from whom the real property being sold by the Commissioner was acquired or his or her surviving spouse or descendant."[49]

Absent from the Court's discussion is the Legislature's reference to a principal abutting landowner's "heirs and assigns" in the statute. But the issue in *McCoy* was not whether the Commissioner was required to give a principal abutting landowner or his heirs or assigns the right of first refusal over all other abutting landowners to purchase a vacated right of way or, in the alternative, to give all abutting landowners notice and the option to pay the fair market asking price for the Division's vacated right of way. The issue in *McCoy* was whether the Commissioner was required to give an abutting landowner the right of first refusal to purchase a vacated right of way for fair market value before it could sell the vacated right of way at public auction for the highest and best price. The Court held in Syllabus Point 3 of *McCoy* that the Commissioner was required to offer all abutting property owners the right to purchase surplus highway property for fair market value before it could sell such property at public auction for the highest and best price:

> Under W. Va. Code, 17-2A-19 [1994], all abutting landowners (whether "principal abutting landowners" or not) must receive

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[47] *Id.* at 727, 500 S.E.2d at 543.

[48] *Id.*

[49] *Id.*

> preferential treatment when the Commissioner of the Division of Highways chooses to sell state highways property that the Commissioner has determined is not necessary for present or future use. The statute directs that the Commissioner must offer to sell property acquired after 1973 that has not substantially changed since its acquisition to principal abutting landowners at a cost equal to the amount paid in acquiring the real estate, plus costs and interest.[50] The Commissioner may also first offer to sell right-of-way property to principal abutting landowners without following the procedures for a public auction. The Commissioner must offer all other abutting property owners the first right to purchase the highways property for fair market value.

In this case, both the Romanos and the Division contend in their response briefs, as the circuit court incorrectly held below, that the Zimmerers were not "principal abutting landowners" under W. Va. Code § 17-2A-19 entitled to notice and a right of first refusal over all other abutting landowners to purchase the Division's vacated right of way because they are not direct descendants or heirs of the Hill family.

As this Court recognized in *McCoy*, "[t]o determine the intent of the Legislature, we must examine the statute in its entirety: In the construction of a legislative enactment, the intention of the legislature is to be determined, not from any single part, provision, section, sentence, phrase or word, but rather from a general consideration of the act or statute in its entirety. Syllabus Point 1, *Parkins v. Londeree*, 146 W.Va. 1051, 124 S.E.2d 471 (1962)." Thus, the analysis of the legal question of whether the Zimmerers are "principal abutting landowners" begins and ends with examination of the language of W. Va. Code § 17-2A-19 in its entirety.

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[50]*See also* W. Va. C.S.R. § 157-2-3.5.b. The property in dispute was not acquired by the Division after 1973, and the Appellants are not surviving spouses or descendants of the Hill family. The Appellants assert, however, that these classifications are not rational and violate the equal protection clause (Section 10 of Article III) of the West Virginia Constitution where the property in dispute was acquired in 1971 and the Appellants are successors in title to the individuals from whom the Division condemned the subject property interest. Syl. Pt. 5, *McCoy v. Vankirk*, 201 W. Va. 718, 55 S.E.2d 534 (1997).

The West Virginia Legislature included "heirs and assigns" in the definition of "principal abutting landowner" under W. Va. Code § 17-2A-19(c)(2) when it directed the Commissioner to "propose rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code governing and controlling the making of any leases or sales pursuant to the provisions of this subsection" including "for the giving of preferential treatment in making leases to the persons from whom the properties or rights or interests in the property were acquired, or their heirs or assigns."

The statute also expressly provides that "[t]he commissioner may transfer, sell or otherwise dispose of any right-of-way properties or any interest or right in the property, owned by or to be acquired by the division of highways which the commissioner in his or her sole discretion determines are not necessary or desirable for present or presently foreseeable future highway purpose by first offering the property to the principal abutting landowners without following the procedure for public auction provided in subsection (b) of this section."[51] Accordingly, the Commissioner must offer principal abutting landowners the right of first refusal to purchase surplus property before it can offer such property to abutting landowners or sell such property at public auction.[52]

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[51] *Id.* (emphasis added).

[52] *Mills v. Vankirk*, 192 W. Va. 695, 453 S.E.2d 678 (1994); *Cottrill v. Ranson*, 200 W. Va. 691, 490 S.E.2d 778 (1997)(underlying purpose of statute governing sale of school property at public auction is to assure rural property owners that, if they convey portion of their land to be used for school purposes and if school operations on property later cease, original grantor of school property may repurchase school property to prevent it from passing into hands of stranger and, thereby, protect parent tract from being damaged; whatever right original grantor has to repurchase school property will pass from original grantor to that grantor's heirs or assigns of parent tract so that such heirs or assigns may repurchase school property and protect parent tract which they own by virtue of conveyance from original grantor).

The Division contends in its response brief that the term "assigns" erases the distinction between a "principal abutting landowner" and an "abutting landowner." Using this case as an example, however, the distinction between the two classes of purchasers is ownership, whether inherited or assigned, of the land subject to the Division's vacated right of way. The Zimmerers are "principal abutting landowners" because they are successors in title to the individuals from whom the Division condemned the subject property interest and, thus, are owners in fee simple of the land subject to the Division's vacated right of way. Accordingly, as "principal abutting landowners," the Zimmerers were entitled to notice and a right of first refusal over all other abutting landowners to purchase the Division's vacated right of way.

The circuit court held that, "The Defendants Mark E. Romano and Robin J. Romano are abutting landowners . . . by virtue of their ownership of the residue of the original 82.65 acre parcel," Order at 3, which is demonstrably incorrect as such residue was reserved from the deed to their predecessor in interest.

Moreover, even if the Romanos had been "abutting landowners" because they owned real property that bordered on or touched the subject property interest, they did not own in fee simple the land subject to the Division's vacated right of way. Accordingly, even as "abutting landowners," which they were not, the Romanos would have, at most, been entitled to notice and the option to pay the fair market asking price for the Division's vacated right of way, but only after the Zimmerers were given notice and a right of first refusal over all other abutting landowners to purchase the Division's vacated right of way as "principal abutting landowners."

How it happened in this case, however, is that the Division gave the Romanos notice and a right of first refusal to purchase the Division's vacated right of way apparently based on the Romanos' misrepresentation that they were the owners in fee simple of the 1.18 acres subject to

the vacated right of way. Moreover, there is no record that the Romanos were required to present a tax certificate, a deed, a title examination, or a survey showing such ownership or even a duly executed affidavit alleging such ownership as provided by the regulations governing the Division's sale of highway property to principal abutting landowners.[53]

C. ALTERNATIVELY, THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN ITS INTERPRETATION OF W. VA. CODE § 17-2A-19 THAT THE APPELLANTS WERE NOT ENTITLED TO NOTICE AND THE OPTION TO EXERCISE A RIGHT OF FIRST REFUSAL AS "ABUTTING LANDOWNERS" TO PURCHASE THE DIVISION'S VACATED RIGHT OF WAY FOR FAIR MARKET VALUE.

In their response briefs, both the Romanos and the Division contend that the Division was required to comply with W. Va. Code § 17-4-47(b) to sell the vacated 1.18 acre right of way to the Romanos to provide them with access to the public highway. The Division further contends that if it does not have the discretion to sell its vacated right of way to the Romanos, the right of way at issue would not be determined to be excess and would not be subject to sale. In other words, if the Division, which does not need the property, cannot transfer it to the Romanos, whom are West Virginia residents, it apparently intends to reverse itself and decide that it still needs the property rather than see it go to the Zimmerers, whose West Virginia ancestors likely predated the Romanos' ancestors, but whom now live in Texas. With all due respect, this raises

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[53]*See* W. Va. C.S.R. § 157-2-3.5(d) ("[T]he abutting landowner is an abutting landowner at the time of the sale. Such landowner shall be determined by the Commissioner's employees or agents or staff, or by attorneys or other professionals employed by the Commissioner to make title examinations or other proof to substantiate who the landowner is. In all cases the landowner shall submit proof of his or her ownership by way of certified copy of deed, payment of current year's taxes evidenced by tax receipt, or in the case of heirs who do not have deeds, such proof shall be by way of certified documented records of heirship or intestate ownership. In the absence of any documentation in the official records of County Clerks' offices in the various counties in the State of West Virginia, the Commissioner may accept duly executed affidavits in support of any alleged ownership by the landowner. Principal abutting landowners . . . shall be determined in the same manner as abutting landowners.").

some suspicion about the relationship between the Division and the Romanos and/or their attorney. There is nothing in the applicable statutes or any other law that would justify conditioning a decision to abandon State property upon whom the property would pass.

The Division's right of way interest was either "not necessary, or desirable for present or presently foreseeable future highway purposes" or not under W. Va. Code § 17-2A-19. The record shows that the Division did not use its right of way interest for the purpose of improving and widening Route 19 because it altered the route originally contemplated in the 1970s. The record further shows that the Division obviously determined that this interest was "not necessary, or desirable for present or presently foreseeable future highways purposes" or else the Division would not have sold it to the Romanos.

Moreover, W. Va. Code § 17-4-47(4)(b) is of no value to the Appellees in this case. The statute provides:

> Except where the right of access has been limited by or pursuant to law, every owner or occupant of real property abutting upon any existing state highway has a right of reasonable means of ingress to and egress from such state highway consistent with those policies expressed in subsection (a) of this section and any regulations issued by the commissioner under section forty-eight of this article."

The title of the statute clearly indicates, however, that it would not apply to a controlled access right of way: "Access from commercial, etc., property and subdivisions to highways--Purposes of regulation; right of access; provisions inapplicable to controlled-access facilities; removal of unauthorized access." W. Va. Code § 17-4-47(d) provides:

> The policies expressed in this section are applicable to state highways generally and shall in no way limit the authority of the state road commission to establish controlled-access facilities under the provisions of sections thirty-nine through forty-six of this article."

W. Va. Code § 17-4-39 provides:

> For the purpose of this chapter, a controlled-access facility is defined as a highway or portion of a highway especially designed for through traffic, and over, from, or to which owners or occupants of abutting land or other persons have no right or only a controlled right or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facility or for any other reason. Such highways may be freeways open to use by all customary forms of highway traffic; or they may be parkways from which trucks, buses, and other commercial vehicles shall be excluded.

Commentators have likewise explained:

> Limited or controlled access highways are designed for movement of through traffic, and cross traffic must be eliminated or severely curtailed and entrances and exists strictly limited, with the result that abutting landowners have no easement or right of access different from that enjoyed by the public in general.
>
> The doctrine granting a right of access to abutting landowners as developed for conventional or land service highways does not have the same application to controlled access highways. One of the principal features which distinguishes a conventional highway from a limited access highway is the right of ingress and egress to and from abutting properties, and such right does not arise for the benefit of abutting landowners in a newly created limited access highway. So, where a new limited access highway is constructed over land on which no highway previously existed, under ordinary circumstances, no access rights accrue to the landowners abutting upon the new highway.[54]

In this case, it is beyond cavil that the Division's vacated right of way was a controlled access right of way. Thus, the Romanos never had any access right of ingress and egress to and from their property different from that enjoyed by the public. Once the Division determined that the right of way was not necessary or desirable for present or presently foreseeable future state road purposes, any right of ingress and egress enjoyed by the public, including the Romanos, ceased to exist. So, not only did the Romanos present no evidence that the Division's vacated right of way was necessary for ingress and egress to and from their property or any existing

[54] 39A C.J.S. *Highways* § 141 (footnotes and citations omitted).

highway, the circuit court erred by awarding the tract to the Romanos based on the ingress/egress issue which was inapplicable given the limited scope and nature of the Division's right of way.

As already explained in detail, the Romanos are the owners in fee simple of only 56.813 acres of the 82.65 acre farm previously owned by the Hill heirs, and the Zimmerers are the owners in fee simple of the 20.29 acres that were subject to the Division's rights of way. This made the Zimmerers not only the only "abutting landowners," but the "principal abutting landowners" who were entitled to notice and a right of first refusal over all other abutting landowners to purchase the Division's vacated right of way.

If the Zimmerers were not "principal abutting landowners," but only "abutting landowners," the circuit court still erred by holding that the Division had the discretion to choose which abutting landowner to give the right of notice and first refusal to purchase surplus property according to his or her needs and properly sold the 1.18 acre vacated right of way to the Romanos without providing the Zimmerers notice and the option to exercise their right of first refusal because awarding the tract to the Zimmerers would cut off the Romanos access to their property.[55]

W. Va. Code § 17-2A-19 does not provide discretion to the Commissioner to choose which abutting landowner should be given notice and the option to purchase surplus property based on need or who owns more abutting property. W. Va. Code § 17-2A-19 provides that "[t]he rules . . . shall also provide for granting a right of first refusal to abutting landowners at fair market value in the sale of any real estate or any interest or right in the property, owned by

[55]Summary Judgment Order dated June 4, 2007.

the division of highways."[56] W. Va. C.S.R. § 157-2-3.5(c) clearly provides the procedure the Division was required to follow:

> An abutting landowner shall be given the right of first refusal whenever the sale of excess property is contemplated under subparagraphs 3.5.a.B. [Public sale], or 3.5.a.D [Private negotiated sale at fair market value to the principal abutting landowners] or under Paragraph 3.5.b. [If excess real estate acquired subsequent to December 31, 1973 . . . is to be sold] . . . . Such right of first refusal gives the abutting landowner the right to purchase the excess property as provided in this section. The abutting landowner shall be notified in writing sent by certified mail, return receipt requested, of his/her right of first refusal and that he/she has sixty (60) days to exercise this right. The right of first refusal is exercised by the abutting landowner through his/her remittance of the price determined by the Division of Highways within sixty (60) days of notification. If the abutting landowner does not exercise his/her right of first refusal by remitting the purchase price to the Division of Highways within sixty (60) days, then the property may be otherwise sold. The Division of Highways will recognize and take action upon a release of the right of first refusal. However, the Division of Highways will not recognize or honor a purported transfer of the right of first refusal so as to create a right in a third party.

In addition to being bound by statutory law and procedure, the Division is bound by Syllabus Point 3 of this Court's decision in *McCoy*, which held that "[u]nder W. Va. Code, 17-2A-19 [1994] . . . [t]he Commissioner must offer all other abutting property owners the first right to purchase the highways property for fair market value."

In this case, it is undisputed that the Division never notified the Zimmerers in writing of their right of first refusal as abutting landowners to purchase the Division's vacated right of way for fair market value as provided in W. Va. C.S.R. § 157-2-3.5(c). It is undisputed that the Division never provided the Zimmerers the option to exercise their right of first refusal as abutting landowners by remitting the fair market price requested by the Division within sixty

[56]W. Va. Code § 17-2A-19(c)(2)(emphasis added).

(60) days of the notification as provided in W. Va. C.S.R. § 157-2-3.5(c).[57] To the contrary, the Romanos were the only landowners, even though not abutting and certainly not principally abutting, given notice and the option to purchase the Division's vacated right of way. Moreover, the Romanos were allowed more than 60 days to exercise their option and were allowed to purchase the vacated right of way for less than fair market value where it was appraised for $2800 in July 2001 and sold to the Romanos for $2600 in January 2002.[58]

D. ALTERNATIVELY, THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT WHERE GENUINE ISSUES OF MATERIAL FACT EXISTED FOR JURY DETERMINATION.

The Romano Appellees contend, without citing any legal authority, that the parties acknowledged by virtue of agreeing to file their respective motions for summary judgment that there were no genuine issues of material fact to be determined.

Whether one or both parties file a motion for summary judgment, it is the circuit court that must determine whether there is a genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law.[59] If any genuine material issue of fact remains and clarification of the issue is necessary for proper resolution of a case, the circuit court must deny summary judgment.[60] Accordingly, it is well established in West Virginia that a

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[57] *See also* Syl. Pts. 2, 3, and 5, *John D. Stump & Assoc. v. Cunningham Mem. Park, Inc.*, 187 W. Va. 438, 419 S.E.2d 699 (1992) (A right of first refusal entitles the rightholder to purchase the property if it is put up for sale. Upon notice to the rightholder that the property is for sale, the right becomes an "option.").

[58] Ex. 30 to Plaintiffs Motion for Reconsideration.

[59] *Floyd v. Equitable Life Assurance Soc'y*, 164 W. Va. 661, 264 S.E.2d 648 (1980).

[60] *See, e.g., Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W. Va. 160, 133 S.E.2d 770 (1963) (a motion for summary judgment must be denied if varying inferences may be drawn from evidence, even if such evidence is uncontradicted or accepted as true); *Dawson v. Allstate Ins. Co.*, 189 W. Va. 557, 433 S.E.2d 268 (1993) (although there may be no dispute as to the basic evidentiary facts, summary judgment is improper where the case stands or falls on the

motion by each of two parties for summary judgment does not constitute a determination that there is no issue of fact to be tried, only that each party concedes that there is no issue of fact with respect to his particular motion, and that both motions should be denied if there is actually any genuine issue of material fact to be tried.[61]

In this case, the Appellants clearly argued below that no evidence was presented by the Romanos that the Division's vacated right of way was necessary for ingress and egress to and from the Romanos' property.[62] The Appellants also argued that the deeds from the Hill heirs clearly and unambiguously conveyed their fee simple interest in the 20.29 acres reserved from the Greenwood Timber deed to the Zimmerers. If ambiguities existed, however, the Appellants presented sufficient evidence to create genuine issues of material fact including affidavits of everyone involved in the various transactions refuting the Romanos' contention that Greenwood Timber owned and conveyed to them the entire 82.65 acres subject to the Division's 20.29 acre rights of way.[63]

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inference that may be drawn from these facts – particularly, where the inferences depend on subjective feelings and intent); *Cavender v. Fouty*, 195 W. Va. 94, 464 S.E.2d 736 (1995) (summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusion to be drawn therefrom).

[61] *Aetna, supra*; *Haga v. King Coal Chevrolet Co.*, 151 W. Va. 125, 150 S.E.2d 599 (1966); *Warner v. Haught, Inc.*, 174 W. Va. 722, 329 S. E. 2d 88 (1985).

[62] *See Law v. Monongahela Power Co.*, 210 W. Va. 549, 558 S.E.2d 349 (2001)(reversing and remanding grant of summary judgment because whether access to replacement road for abandoned public highway was necessary was question of fact); *see also Mason v. State*, 656 P.2d 465, 469 (Utah 1982) (concluding that abutting property owner's right to preserve status quo entitles owner to easement over abandoned public road only where and to extent necessary for ingress and egress to and from property); *Black v. Steenwyk*, 333 Ark. 629, 970 S.W.2d 280, 283 (1998) (The determination of whether an easement is "necessary" has been deemed a question of fact).

[63] Such evidence included (1) an affidavit from Larry Losch, the lawyer who prepared the Hill/Greenwood Timber deed, regarding his communications with the parties and understanding of their intentions; (2) an affidavit from James William Hill, Jr. regarding the intention of the

The Zimmerers also requested additional discovery, including the depositions of Larry Losch and the Hill heirs regarding their involvement and understanding of what was being conveyed in the Hill/Greenwood Timber transaction and the depositions of the Romanos regarding their understanding of what was being conveyed in the Greenwood Timber/Romano and Division of Highway/Romano transactions. Where genuine material issues of fact remain and clarification of those issues are necessary for proper resolution of a case, summary judgment is improper.

III. CONCLUSION

Respectfully, there is nothing in either the Romanos' or the Division's brief which can justify affirming what occurred in the Circuit Court of Nicholas County in this proceeding.

First, the circuit court awarded real property to the Romanos which was owned in fee simple by the Zimmerers. The real property was never owned by the Romanos or the West Virginia Division of Highways. Rather, in accordance with West Virginia law, the Division only obtained a right of way for road purposes, not a fee simple interest in the real property.

Second, when the Division's right of way for a public road was vacated as surplus, the Division sold the vacated right of way to the Romanos without affording the Zimmerers their constitutional and statutory rights arising from their ownership in fee of the real property subject

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parties with respect to the Hill/Greenwood Timber deed; (3) an affidavit from Tom Watkins Perry, Sr. regarding the intention of the parties with respect to the Hill/Greenwood Timber deed; (4) the testimony of Alex Gates, Greenwood president, to the effect that he was purchasing only a surface interest; and (5) other circumstantial evidence, including the Division's answer acknowledging the Zimmerers' fee simple ownership of the land in dispute in this action. *See also, e.g., Sally-Mike Properties v. Yokum*, 175 W.Va. 296, 300, 332 S.E.2d 597 (1985) ("The language of the instrument itself, and not surrounding circumstances, is the first and foremost evidence of the parties intent. Resort to rules of construction and aids to interpretation, including extrinsic evidence, is proper where the language of an instrument is ambiguous and subject to more than one meaning. And in cases involving reservations and exceptions, any remaining doubt as to intent should be resolved in the grantee's favor.").

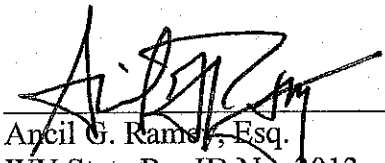
to the Division's vacated right of way as well as their ownership in fee of property abutting the Division's vacated right of way.

Finally, the circuit court's order constitutes both an unconstitutional taking of the Zimmerers' private property and an unconstitutional deprivation of the Zimmerers' property rights without due process of law and just compensation in violation of the state and federal constitutions.

WHEREFORE, the Appellants, Ann Morgan Zimmerer and Gerald Lee Zimmerer, respectfully request that the Court enter judgment as a matter of law in their favor or, in the alternative, remand the case for a jury trial.

ANN MORGAN ZIMMERER and GERALD LEE ZIMMERER

By Counsel



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CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on November 24, 2008, I served the foregoing "Reply Brief of Appellants" upon counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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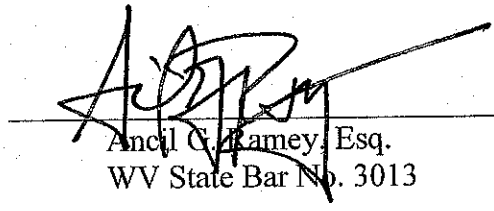

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